(3)

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1424

In The

Supreme Court of the United States

JEANNE WOODFORD, Warden,

Petitioner,

v.

FRED BERRE DOUGLAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARK E. OVERLAND
Counsel of Record
MARK A. BORENSTEIN
JULIE M. RUHLIN
OVERLAND & BORENSTEIN LLP
6060 Center Drive, Seventh Floor
Los Angeles, California 90045
Telephone: (310) 215-6580
Facsimile: (310) 215-6581

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
REASONS FOR DENYING THE WRIT	1
ARGUMENT	3
I. PETITIONER MISUNDERSTANDS THE *STRICKLAND* PREJUDICE STANDARD	3
II. THE NINTH CIRCUIT APPLIED ESTABLISHED *STRICKLAND* PRINCIPLES TO FIND THAT RESPONDENT'S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE REPRESENTATION IN THE PENALTY PHASE OF TRIAL	5
CONCLUSION	15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994).....14

Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995).....10

Babbitt v. Calderon, 151 F.3d 1170 (9th Cir. 1998).....4, 5

Battenfield v. Gibson, 236 F.3d 1215 (10th Cir. 2001).....10, 11

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), *cert. denied*, 504 U.S. 946 (1992).....14

Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002).....13

Coleman v. Mitchell, 268 F.3d 417 (6th Cir. 2001).....8, 10

Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000).....10

Douglas v. Woodford, 316 F.3d 209 (9th Cir. 2003)..*passim*

Eddings v. Oklahoma, 455 U.S. 104 (1982)..... 6

Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996)..... 9

Hill v. Lockhart, 28 F.3d 832 (8th Cir. 1994)..... 8

Hitchcock v. Dugger, 481 U.S. 393 (1987)..... 7

Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).....10

Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995).....10, 13

Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001)..... 8

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002).....15

Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).....13

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000).....13

Lockett v. Ohio, 438 U.S. 586 (1978)..... 6

Marshal v. Hendricks, 307 F.3d 36 (3d Cir. 2002)..... 4

TABLE OF AUTHORITIES – Continued

Page

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) 8

Mills v. Maryland, 486 U.S. 367 (1988) 7

Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001) 4

Neal v. Puckett, 296 F.3d 230 (5th Cir. 2002) 8

Penry v. Johnson, 532 U.S. 782 (2001) 7

Penry v. Lynaugh, 492 U.S. 302 (1989) 6

Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994) 8

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) 4, 5

Skipper v. South Carolina, 476 U.S. 1 (1986) 7

Stouffer v. Reynolds, 168 F.3d 1155 (10th Cir. 1999) 8

Strickland v. Washington, 466 U.S. 668 (1984) .....*passim*

Sumner v. Shuman, 483 U.S. 66 (1987) 7

United States v. Gray, 878 F.2d 702 (3d Cir. 1989) 14

Williams v. Taylor, 163 F.2d 860 (4th Cir. 1998).....2, 4

Williams v. Taylor, 526 U.S. 1048 (1999) 3

Williams v. Taylor, 529 U.S. 362 (2000).....1, 2, 5, 7, 8

STATE CASES

Commonwealth v. Smith, 675 A.2d 1221 (Pa. 1996).....9, 14

Goad v. Tennessee, 938 S.W.2d 363 (Tenn. 1996) 9

Hodge v. Kentucky, 68 S.W.3d 338 (Ky. 2002)..... 9

People v. Belmontes, 45 Cal. 3d 744, 248 Cal. Rptr. 126 (1988)..... 4

People v. Morgan, 719 N.E.2d 681 (Ill. 1999).....9, 14

TABLE OF AUTHORITIES – Continued

Page

People v. Mozingo, 34 Cal. 3d 926, 196 Cal. Rptr. 212 (1983) 15

Rose v. Florida, 675 So. 2d 567 (Fla. 1996) 9

State ex rel. Busby v. Butler, 538 So. 2d 164 (La. 1988) 9

State v. Wright, 653 A.2d 288 (Del.1994) 10

Turpin v. Christenson, 497 S.E.2d 216 (Ga. 1998) 9

STATE STATUTES

Cal. Penal Code §190.3 ..... 2, 4

STATEMENT OF FACTS

Respondent adopts the statement of facts in the reported opinion of the Court of Appeals, *Douglas v. Woodford*, 316 F.3d 209 (9th Cir. 2003),[1] reported in the Appendix to the Petition herein, at 1-25.

REASONS FOR DENYING THE WRIT

Respondent's Petition for Writ of Habeas Corpus was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Therefore, pre-AEDPA standards apply.

This case does not meet this Court's criteria for granting *certiorari* under Rule 10(a) of the Rules of the Supreme Court of the United States. On both "Questions" presented by Petitioner, the Ninth Circuit's decision is not in conflict with a decision of another circuit court, nor does the decision depart, in any way, let alone "so far from the accepted and usual course of judicial proceedings," to require this Court's intervention. Rather, the Court of Appeals applied settled law under *Strickland v. Washington*, 466 U.S. 668 (1984), and more recently in *Williams v. Taylor*, 529 U.S. 362 (2000), in a straightfoward manner, fully consistent with decisions in other circuit courts and the state courts.

[1] Petitioner erroneously claims that Hernandez was "retarded." No evidence of Hernandez' mental retardation is in the record. *See* Petition for Writ of Certiorari at 3 n.1.

Petitioner's perplexing argument is that the Court of Appeals misconstrued *Strickland*, *Williams* and their progeny, in holding the reasonable probability that a single juror would have voted against the death penalty, absent trial counsel's ineffective assistance, is insufficient to establish prejudice. Petition at 9. Yet, as Petitioner acknowledges, *see* Petition at 14, that is the *exact standard* for determining prejudice, i.e., whether "the result of the proceeding would have been different," *Strickland* at 694, which has been repeatedly applied by this Court and the circuit courts. In California, if a single juror declined to vote for imposition of the death penalty, the "result" of the penalty phase would have been different, since the death penalty could not be imposed without a unanimous jury verdict. *See* Cal. Penal Code §190.3. Instead, consistent with the judgment of the Court of Appeals, the trial court would have entered a sentence of life without the possibility of parole, unless the prosecutor elected to retry the penalty phase. Nothing in this Court's jurisprudence suggests that when both the *Strickland* and *Williams* decisions required a "different result" to establish prejudice, the Court really meant a "different verdict."

In California, converting the "different result" prejudice standard to proof of a "different verdict" as requested by Petitioner, would have a constitutionally impermissible consequence: a death verdict would stand even when mitigation evidence, that should have been presented by effective counsel would have prevented a unanimous death decision. There is simply no divergence of opinion on the settled principle that prejudice is established if the "result" of the penalty phase would have been different. In fact, the one decision cited by Petitioner as evidence of a split, *Williams v. Taylor*, 163 F.2d 860 (4th Cir. 1998), *see*

Petition at 14-15, was reversed by this Court. *See Williams v. Taylor*, 526 U.S. 1048 (1999). That is no reason for this Court to intervene.

There is also no split in the decisions of the circuit courts and no compelling reason for the Court to review Petitioner's second "Question." Both *Strickland* and *Williams* compel a thorough and complete penalty phase investigation. Though the nature and extent of a complete investigation may vary depending on the circumstances of each case, the constitutional principle applied below and in numerous cases remains the same: competent counsel must make a reasonable penalty phase investigation, sufficient to make a strategic decision whether and to what extent the discovered evidence should be presented to the penalty phase jury. Here, the Court of Appeals applied this settled principle to the facts and found that counsel failed to investigate adequately penalty phase evidence, not on the basis of material discovered by habeas counsel, but on the basis of readily available evidence that could have been discovered by trial counsel, without any assistance from Respondent. As with the first "Question" presented by Petitioner, there is no split in the circuits or any other compelling reason to review the Court of Appeals' judgment.

ARGUMENT

I. PETITIONER MISUNDERSTANDS THE *STRICKLAND* PREJUDICE STANDARD.

Petitioner inexplicably claims that prejudice is not established in the penalty phase of a capital trial by proof that a single juror may have declined to vote for death had

trial counsel performed effectively. Petition, 10-11. However, California law clearly prohibits the imposition of a death sentence absent a unanimous jury verdict of death. *People v. Belmontes*, 45 Cal. 3d 744, 815, 248 Cal. Rptr. 126 (1988). Accordingly, the failure of a single juror to acquiesce in a death verdict provides a different "result" within the meaning of *Strickland*. *See Marshal v. Hendricks*, 307 F.3d 36, 103-104 (3d Cir. 2002) (given the unanimity requirement for a death verdict, "the 'reasonable probability of a different outcome' would mean that only one juror need weigh the factors differently."), and *Neal v. Puckett*, 239 F.3d 683, 691-92 (5th Cir. 2001). Since there are only two possible sentences following conviction for capital murder – death or life without parole, *see* Cal. Penal Code §190.3, the Ninth Circuit's decision granting a new penalty phase trial or permitting the state to impose the lower penalty, *see Douglas v. Woodford*, App. at 25, is precisely the outcome California law would have required if at the original trial, one juror dissented from the imposition of the death penalty.

The sole decision relied on by Petitioner that Petitioner claims creates a conflict among the circuit courts is the Fourth Circuit's decision in *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998). *See* Petition at 14-15. That decision, however, was *reversed* by this Court on the ground that the Court of Appeal applied the wrong prejudice standard when that court reversed the district court's finding of prejudice in the penalty phase of trial.

Nor is there any conflict within the Ninth Circuit. *See* Petition at 16. In both *Silva v. Woodford*, 279 F.3d 825, 849 (9th Cir. 2002), and *Babbitt v. Calderon*, 151 F.3d 1170, 1176 (9th Cir. 1998), the Ninth Circuit did not require a different *verdict*, but rather indicated that the trial court

result – that is, a death sentence, would either have (a) remained the same because there would not have been a dissenting juror after consideration of the mitigation evidence that should have been uncovered, as in *Babbitt*, or (b) changed because one or more jurors would have declined to impose a death sentence after hearing the new mitigation evidence, as in *Silva*. The panel which decided the decision below obviously perceived no conflict. The decision below cited *both Babbitt*, *see* App. at 13, and *Silva*, *see* App. at 9, 13, 15 and 16.

II. THE NINTH CIRCUIT APPLIED ESTABLISHED *STRICKLAND* PRINCIPLES TO FIND THAT RESPONDENT'S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE REPRESENTATION IN THE PENALTY PHASE OF TRIAL.

The decision of the Court of Appeals applied longstanding principles, as announced in *Strickland*, and recently applied in *Williams v. Taylor*, 529 U.S. 362, to find that trial counsel's failure to uncover mitigating evidence readily available at the time of trial without the help of Respondent, fell below the standard for effective penalty phase representation.[2] This Court's longstanding interpretation of Eighth Amendment jurisprudence has required that the sentencer be given the opportunity to

[2] The Court of Appeals did not, as Petitioner seems to claim, rely on any evidence that was not available at the time of trial, had trial counsel conducted an adequate penalty investigation. Moreover, the Ninth Circuit considered only evidence that could have been discovered *without* Respondent's cooperation. *See Douglas v. Woodford*, at App. 8 n.2 and 12-14.

assess "the character and record of the individual offender," as well as "the circumstances of the particular offense." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (internal quotation marks and citation omitted). As this Court has explained,

> [i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted).

The sentencer's constitutional mandate is therefore to render "a reasoned moral response" to the unique individual circumstances of the capital defendant. *Penry v. Lynaugh*, 492 U.S. at 327; *see also Eddings v. Oklahoma*, 455 U.S. at 111 (consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death"). Indeed, this Court has repeatedly struck down obstacles to full consideration of mitigating evidence by the capital sentencer. *See, e.g., Eddings*, 455 U.S. at 113-15 (invalidating sentence where state decision allowed as mitigation only evidence that would tend to excuse criminal liability); *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) (invalidating Ohio law that did not permit consideration of defendant's character, age, prior record, lack of specific intent to cause death, and role in the crime); *Penry v. Lynaugh*, 492 U.S. at 322 (reversing conviction because jury could not express a "reasoned

moral response" to evidence of mental retardation and childhood abuse); *Skipper v. South Carolina*, 476 U.S. 1, 2 (1986) (reversing conviction when State prohibited consideration of evidence that defendant "made a good adjustment" during incarceration); *Sumner v. Shuman*, 483 U.S. 66, 77-78 (1987) (invalidating statute that prohibited individualized consideration for defendant convicted of murder while serving a life sentence); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (invalidating Florida jury instructions prohibiting jury from considering non-statutory mitigating evidence); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that State may not restrict juries to consideration of only unanimously found mitigating circumstances).

Defense counsel's failure to investigate and present *available* mitigating factors equally undermines the reliability of the sentencer's "appraisal of [the defendant's] moral culpability. *See, e.g., Williams v. Taylor*, 529 U.S. at 398. It is only when available mitigating evidence is considered that "we can be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotation marks and citation omitted).

Williams v. Taylor reaffirmed that capital defense counsel's duty under *Strickland* encompasses a thorough investigation of the defendant's life history. Trial counsel in *Williams* failed to conduct an investigation that would have uncovered evidence of Williams' "nightmarish" childhood. This Court held that trial counsel had failed to fulfill the "obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396. Justice O'Connor (joined by Justice Kennedy) reiterated in concurrence that Williams' counsel had failed to conduct the

"requisite, diligent investigation" into Williams' "troubling background and unique personal circumstances." *Id.* at 415 (O'Connor, J., concurring).

Williams merely confirmed the consistent understanding of numerous courts of appeal that *Strickland* requires counsel to perform a thorough investigation for mitigation evidence, and that counsel's failure to do so constitutes deficient performance absent justification for believing such an investigation unwarranted. As the *en banc* Fifth Circuit held unanimously, "we consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 296 F.3d 230, 236 (5th Cir. 2002) (internal quotation marks and citation omitted). "In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (internal quotation marks and citation omitted). *Coleman v. Mitchell*, 268 F.3d 417, 450 (6th Cir. 2001) (case law "has strongly established defense counsel's Sixth Amendment duty to independently investigate in preparation for the penalty phase of a capital trial"); *see also Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (*en banc*); *see Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994) (defendant's lawyers must "collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial"); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigation evidence."); *Jermyn v. Horn*, 266 F.3d 257, 304-308 (3d Cir.

2001); *Emerson v. Gramley*, 91 F.3d 898, 905-907 (7th Cir. 1996).

State appellate courts have interpreted *Strickland* in the same manner. "[T]he failure to present mitigating evidence at trial can be reasonable if shown to be the result of [a] tactical decision, the failure to investigate the existence of such evidence is ineffective assistance of counsel." *State ex rel. Busby v. Butler*, 538 So. 2d 164, 171 (La. 1988). *See Rose v. Florida*, 675 So. 2d 567, 572 (Fla. 1996) ("It is apparent from the record that counsel never attempted to meaningfully investigate mitigation, and hence violated the duty of counsel to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (internal quotation marks and citation omitted); *Goad v. Tennessee*, 938 S.W.2d 363, 370 (Tenn. 1996) ("[C]ounsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases."); *Hodge v. Kentucky*, 68 S.W.3d 338, 344 (Ky. 2002) ("[I]t appears that neither [defendant's] defense counsel conducted any investigation. . . . If there was no investigation, then their performance was deficient."); *Turpin v. Christenson*, 497 S.E.2d 216, 227 (Ga. 1998) ("[B]efore selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing."); *People v. Morgan*, 719 N.E.2d 681, 704 (Ill. 1999) ("[D]efense counsel has a duty to make a reasonable investigation for mitigation evidence to present at the capital sentencing hearing, or must have a sound reason for failing to make a particular investigation."); *Commonwealth v. Smith*, 675 A.2d 1221, 1223 (Pa. 1996) (ineffective assistance when "[t]rial counsel neither pursued nor presented any evidence of mental state at the penalty

phase even though some evidence may have existed"); *State v. Wright*, 653 A.2d 288, 299 (Del. 1994) ("While there is no absolute duty to present all potentially mitigating evidence for use at the penalty stage, defense counsel has a general duty to investigate potentially mitigating evidence.").

Purported tactical choices by defense counsel unsupported by adequate prior investigation constitute defective performance under *Strickland*. As the Eleventh Circuit has noted, "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). *See also Coleman v. Mitchell*, 268 F.3d 417, 447-54 (6th Cir. 2001) (counsel could not make a reasoned decision to forgo mitigation in favor of a lingering doubt defense because counsel had not investigated, and therefore did not realize he could have presented strong mitigation based on the defendant's abusive childhood); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (counsel's decision to focus on "sympathy and mercy," rather than a mitigation case, was unreasonable when counsel did not thoroughly investigate available mitigation evidence before choosing his strategy); *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("Thus, our case law rejects the notion that a strategic decision can be reasonable when the

attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotation marks and citation omitted). Indeed, in the absence of a thorough investigation, counsel cannot "competently advise [the client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue. *Battenfield v. Gibson*, 236 F.3d at 1229.

The Court of Appeals noted that Respondent's trial counsel recognized that a psychiatric defense might be viable, that counsel had a psychologist appointed to examine Respondent for a limited purpose and obtained $35,000 for additional mental health testing, but never used these additional funds purportedly because Respondent would not cooperate. *Douglas v. Woodford*, App. at 8. However, counsel's responsibility did not end because of Respondent's lack of cooperation. Not only was "there . . . a significant alternative source of information that was readily discoverable," the file pertaining to Respondent's prior offense which identified a psychologist who had thoroughly examined Respondent four years earlier, but also "it was easy to ascertain that Douglas' line of work exposed him to toxic solvents," App. at 14, and "evidence regarding a serious head injury . . . could have been detected from medical records." *Id.* Trial counsel stated he "would have loved" to have had this information at Respondent's trial, and Petitioner conceded it was "professional error" for trial counsel not to have uncovered the previous psychologist. *Id.* at 10. The Court of Appeals also found that trial counsel was ineffective in his investigation of Respondent's background and social history. *Id.* at 11-14. Had trial counsel investigated sources of information

available at the time of trial, he could have presented the following at trial:

> "Douglas was abandoned as a child and raised by foster parents, including an abusive alcoholic foster father who locked him in a closet for long periods of time. He grew up in an extremely poor Chicago neighborhood where children had to scavenge for food in garbage cans and often ate lard or ketchup sandwiches. After running away at the age of fifteen to join the Marines, Douglas was arrested and put in a Florida jail where he was beaten and gang-raped by other inmates. . . .
>
> In the Marines, Douglas earned a number of medals and commendations and also helped rescue two drowning sailors. Another witness [would have] testified that Douglas had been very helpful to her during her pregnancy and marital difficulties.
>
> Finally . . . additional evidence [was available] of possible brain damage. After the military, Douglas began working in furniture refinishing and was exposed to toxic solvents daily. In 1967, Douglas was involved in a serious auto accident and suffered a concussion and damage to his left temporal lobe. He also consumed a great deal of alcohol on a daily basis from 1966 to 1977."

Douglas v. Woodford, App. at 12-13.

Petitioner mistakenly claims that the Court of Appeals did not assess the reasonableness of trial counsel's investigation in 1988, but rather determined his effectiveness on the basis of evidence developed by habeas counsel. Petition at 16-17. On the contrary, the Court of Appeals recognized that trial counsel was on notice contemporaneously about Respondent's mitigating mental health and

social history. *Douglas v. Woodford*, App. at 13-14. With respect to Respondent's background and social history, the Court of Appeals determined there was available information from sources other than Respondent that trial counsel failed to discover on a large range of potentially mitigating evidence, including evidence trial counsel had:

> "In sum, although [trial counsel] did perform some investigation, it was constitutionally inadequate. The information [trial counsel] did obtain about Douglas's troubled childhood revealed the need to dig deeper, and he did not adequately prepare the witnesses in order to present the material he did gather to the jury in a sufficiently detailed and sympathetic manner."

Id. at App. 14.

As federal and state courts applying *Strickland* have consistently held in comparable circumstances, counsel's knowledge of the rudimentary facts contained in Respondent's history does not discharge the duty to investigate, but triggers it. *See, e.g., Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective when he was aware of defendant's "extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined [the defendant] of those facts"); *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel had "a small amount of information" that necessitated further inquiry); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991) (counsel ineffective when "his belief that mitigating evidence was

too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence"); *People v. Morgan*, 719 N.E.2d 681, 705 (Ill. 1999) (finding ineffectiveness when, "despite being aware of defendant's mental condition and brain damage, defense counsel failed to conduct an investigation into this relevant potential mitigation evidence"); *Commonwealth v. Smith*, 675 A.2d 1221, 1233-34 (Pa. 1996) (ineffective assistance when "record reflect[ed that defendant] suffered some mental problems," yet counsel "neither pursued nor presented any evidence of mental state at the penalty phase.")

Petitioner also erroneously asserts that counsel's deficient performance was excused because of Respondent's failure to cooperate. Petition at 9.[3] Such a rule would make the client the sole source of mitigating evidence, regardless of his mental condition or his ability to provide investigative leads. In any event, the Court of Appeals carefully considered only the evidence trial counsel could have readily developed without Respondent's cooperation. *See* App. at 8-9 n.2.

Trial counsel's duty to investigate and make intelligent tactical decisions based on that investigation cannot be discharged simply because of his client's reluctance or opposition. *See Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994); *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991), *cert. denied*, 504 U.S. 946 (1992); *United*

[3] Petitioner mischaracterizes Respondent's failure to cooperate as "roadblocks." (Petition, p. 9) Respondent merely did not agree to comprehensive psychological testing and "was not forthcoming with useful" social history information. *Douglas v. Woodford*, App. at 13.

States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989); *People v. Mozingo*, 34 Cal. 3d 926, 934, 196 Cal. Rptr. 212 (1983). In sum, "[c]ounsel's duty to investigate mitigating evidence is neither entirely removed nor substantially alleviated by his client's direction not to call particular witnesses to the stand." *Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002).

CONCLUSION

The Ninth Circuit correctly applied settled law as announced by this Court and as applied consistently by the circuit courts and the state courts, to find both ineffective performance by trial counsel in the penalty phase of trial, and resulting prejudice. The petition for writ of certiorari should be denied.

Respectfully submitted,

MARK E. OVERLAND
Counsel of Record
MARK A. BORENSTEIN
JULIE M. RUHLIN

Attorneys for Respondent